

“Improving Access to Justice: Legislative and Administrative Reforms under the Constitution”

Kariuki Muigua*

1.0 Introduction

It has been said that access to justice entails “*the provision of dispute resolution mechanisms which are affordable, proximate and ensure speedy justice and whose processes and procedures are understood by users*”. In this broader context access to justice includes issues to do with accessibility of courts (including other judicial and quasi-judicial fora), language of court proceedings including interpretation services, court fees, public participation in administration of justice, accessibility to persons with disability and availability of information.¹ However, access to justice in Kenya has been bedeviled by myriad of challenges including high court fees, geographical location, complexity of rules and procedure, use of legalese, understaffing, lack of financial independence, lack of effective remedies, a backlog of cases that delays justice, lack of awareness on ADR and traditional dispute resolution mechanisms.²

Nonetheless, there is hope since with the enactment of the Constitution of Kenya 2010; access to justice is now one of the fundamental rights guaranteed therein. Article 48 of the constitution obligates the State to ensure access to justice for all persons and if any fee is required to ensure that it is reasonable and it does not impede access to justice. Article 48 is geared towards enhancing access to justice for all persons in Kenya especially the poor and marginalized communities. So as to effectively implement the constitutional provisions on the right to access to justice, Schedule Five of the Constitution provides for legislation to be put in place by parliament so as to give effect to Article 48 of the Constitution. Even though the constitution provides the yardstick from which access to

*Kariuki Muigua, PhD., LLM, LLB (Hons) Nairobi, FCIArb, FCPSK, MKIM and Lecturer at the University of Nairobi.

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¹ Draft Report on Audit of Laws on Access to Justice, KLRC (March, 2012). See also FIDA Kenya, “*The Peoples Version Informal Justice System*” (2011), which defines access to justice as ‘*the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards*’; “Judicial Reforms and Access to Justice in Kenya: Realizing the Promise of the New Constitution”, A Report by the Kenya Civil Society Strengthening Program, 2011.

² *Strengthening Judicial Reform in Kenya; Public Perceptions and Proposals on the Judiciary in the new Constitution*, ICJ Kenya, Vol.III, May, 2002; Jackton B. Ojwang, “The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development,” 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29: 29.

justice must thrive, there are international treaties providing for the right to access to justice and that Kenya is under an obligation to comply with.³

2.0 Constitutional Provisions on access to justice

Apart from Article 48 providing for the right to access to justice for all there are other provisions that are geared towards enhancing equal access to judicial and other administrative institutions and mechanisms for protection of rights, that adjudication of claims is fair, impartial, expeditious and effective and that those who are in violation are treated humanely and are given a reasonable chance to right their wrongs.

Article 22 obligates the Chief Justice to make rules to provide for the right of every person to access courts and seek the enforcement of rights or fundamental freedoms in the Bill of Rights that has been denied, violated or infringed or is threatened. Article 22 (3) is geared towards ensuring that there are no factors that will impede access to justice when enforcing the Bill of Rights by ensuring that no fees are charged for commencing proceedings; removing the strict legal requirement of proving *locus standi*; minimizing procedural formalities, entertaining the commencement of proceedings on the basis of informal documentation and allowing experts to appear as friends of the court where necessary.

Article 35 grants every citizen the right of access to information held by the State and information held by another person and required for the exercise or protection of any right or fundamental freedom. It also entitles the citizen the right to the correction or deletion of untrue or misleading information that affects the person and also obligates the State to publish and publicise any important information affecting the nation.⁴ It is arguable that the right to access information will be essential in enhancing access to justice as the public will have the right to access all the information they may need so as to institute a suit.

Article 47 guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. It requires the giving of written reasons where a right or fundamental freedom of a person has been or is likely to be adversely affected by an administrative action. All of these concepts have a bearing on access to justice to persons who appear before administrative bodies. It should be noted that whereas, Article 47 (1) provides for the right to fair administrative action, parliament has not enacted the legislation enacted in Clause 3 thereof. This could pose a challenge to

³They include *inter alia* the Charter of the United Nations, the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights (ICCPR), the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

⁴ Ibid, Article 35 (1), (2) and (3).

access to justice especially to the poor, marginalized and less privileged members of the community. Enactment of the envisaged legislation should take a human rights approach that encompasses public participation, comprehensive debate and engagement with key stakeholders dealing with the administration of justice.⁵

Access to justice is further guaranteed by articles 49, 50 and 51 providing for the rights of arrested persons, fair hearing and the rights of persons who are detained, held in custody or imprisoned respectively.⁶Article 49 (1) (c) and 50 (7) seem to allow paralegals to intervene in court proceedings on behalf of the accused or victims which may improve access to justice in criminal justice as it is likely to enhance the role of paralegals in offering legal representation. Article 49 (1) (c) provides that an arrested person has the right “*to communicate with an advocate and other persons whose assistance is necessary.*” While Article 50 (7) stipulates that in the interest a court may allow an intermediary to assist a complainant or an accused person to communicate with the court. This will have the effect of ensuring access to criminal justice in Kenyan courts.

Article 50 (1) provides for the right of every person to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Article 50 (1) aims at ensuring expediency, fairness of process, equality in accessing legal services and effective dispute resolution mechanisms. This is vital in enhancing access to justice in Kenya.

Article 50 (2) (h) provides for the right of every accused person “to have an advocate assigned [...] by the State and at State expense, if **substantial injustice would otherwise result** and to be informed of this right promptly”. However, the Constitution leaves undefined the meaning of “substantial injustice” and given its fairly recent inauguration, jurisprudence is correspondingly scarce on the matter.

Article 159 (1) of the Constitution provides that judicial authority is derived from the people and vests in and shall be exercised by courts and tribunals established by or under the Constitution. In exercise of that authority courts and tribunals shall be guided by principles, *inter alia*, that:

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

⁵ Schedule Five lists both Art.47 under the legislation to be enacted by Parliament within the next 4 years.

⁶ Schedule Five lists both Art. 50 and 51 under the legislation to be enacted by Parliament within the next 4 years.

(e) the purpose and principles of this Constitution shall be protected and promoted.

By stipulating that *“Justice shall be done to all, irrespective of status”* Article 159 echoes the right of all persons to have access to justice as guaranteed by Article 48 of the constitution. It also mirrors the spirit of Article 27(1) which provides that *“every person is equal before the law and has the right to equal protection and equal benefit of the law”*. To ensure that justice is done to all the concerns of the poor and vulnerable in the society need to be included in legislation, strategies, policies, programmes, conception and design from the outset so that they do not fall through the cracks of justice reform. The working of the justice system and institutions, people’s perceptions of justice, the barriers they face in accessing justice and the ways to overcome those barriers have to be understood. If justice programming does not produce results for the most vulnerable, we run the risk of widening existing gaps in access to justice.⁷

The foregoing provisions clearly reveal that the threshold set by the constitution in relation to access to justice is high and certain legislative and administrative reforms have to be undertaken to realize access to justice.

3.0 Legislative and Legislative Reforms under the Constitution

So as to effectively implement the right to access to justice certain legislative and administrative reforms will have to be undertaken. These include:

3.1 Laws to be enacted

Schedule Five of the Constitution provides for legislation to be put in place by parliament so as to give effect to Article 48 of the Constitution. It should be noted that this legislation has not been enacted. The legislature should expeditiously enact a legislation which shall give effect to Article 48 of the constitution.

It should be noted further that whereas, Article 47 (1) provides for the right to fair administrative action, parliament has not enacted the legislation envisaged in Clause 3 thereof. This could pose a challenge to access to justice especially to the poor, marginalized and less privileged members of the community. Enactment of the envisaged legislation should take a human rights approach that encompasses public participation, comprehensive debate and engagement with key stakeholders dealing with the administration of justice.⁸

3.2 Review of laws

⁷ Draft Report on Audit of Laws on Access to Justice, KLRC (March, 2012)

⁸ Schedule Five lists both Art.47 under the legislation to be enacted by Parliament within the next 4 years.

There will be need to review existing legislative instruments dealing with access to justice with the aim of aligning them with the constitution. Some of the laws that need to be amended are the Civil Procedure Act, Criminal Procedure Code, Evidence Act, Children's Act, Law Reform Act, Limitation of Actions Act, Judicature Act, Judicature Act, Kadhis' Courts Act, HIV and AIDS Prevention and Control Act, Law of Contract Act, Arbitration Act among others.

The review should be geared towards bringing the laws into conformity with the constitutional provisions on access to justice. They will, *inter alia*, need to be amended and streamlined so that the language, form, procedures, rules of evidence and content of pleadings in Court proceedings are simplified and kept to a minimum in an attempt to align them with Articles 22 (3), 48 and 159 (2) of the constitution which emphasise on the need to do justice rather than on the need to observe rules of procedure. Where fees are prescribed the law should provide that such shall be reasonable.

3.3 ADR and traditional Dispute resolution mechanisms

With regards to ADR and traditional dispute resolution mechanisms the constitution in Article 159 recognizes their role in conflict resolution. Both the ADR and traditional dispute resolution mechanisms are informed by key conceptual imperatives of access to justice to wit, expedition, fairness, equality of opportunity, flexibility, cost-effectiveness, party satisfaction, proportionality, fostering relationships, voluntariness, autonomy over process, outcome and choice of a third party. Their use in conflict management will thus enhance access to justice.⁹

With the passage of the constitution of Kenya 2010, ADR has now been explicitly recognized by Kenyan law. They can now be effectively applied in resolving a wide range of commercial disputes, family disputes and natural resource based conflicts, among others thus easing access to justice.

Some mechanisms such as mediation will have to be applied cautiously as there is a likelihood of muddling them with the court process as has happened under section 59 of the Civil Procedure Act. Section 59 of the CPA introduces court-annexed mediation. Mediation conducted under section 59 of the Act will still not yield much in enhancing access to justice as envisaged by article 48 and 159 of the Constitution as the process is still subject to the procedural technicalities and other barriers to access to justice. It is therefore imperative that Section 59 of the Civil Procedure Act be reviewed so that the Act

⁹See generally, David Bloomfield, "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *Journal of Peace Research*, Vol.32, No. 2 (May, 1995), p. 153; Kenneth Cloke, "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005

may provide for mediation as an informal dispute resolution mechanism in which case parties exhibit autonomy and voluntariness in the resolution of their disputes.¹⁰

TDRM's are closer and often more accessible to poor and disadvantaged people compared to courts and avail some expeditious, cost-effective and culturally relevant remedies. These mechanisms are the keystone for conflict management and access to justice for the vulnerable, disadvantaged and poor people in most countries where these mechanisms have been employed. Common features of these mechanisms include the fact that they address the collective interests at stake in disputes; they are based on a process of consultation; they emphasize on reconciliation and restoring social harmony; they involve a high degree of public participation; the rules of evidence and procedure are flexible; there is no legal representation; process is voluntary and the decision is based on agreement and they have a high level of acceptance and legitimacy.¹¹

With regards to national policies on access to justice, there is lack of a comprehensive policy on access to justice. Apart from legal aid provided by civil society and religious groups, there is a lack of national policies to address and improve matters relating to access to justice.¹² This situation prevails notwithstanding the fact that the Constitution provides for access to justice as a right. There will be a need for a comprehensive policy on legal aid and awareness to effect to the provisions of Article 59 (2) and (4) of the Constitution.

4.0 Recommendations

To improve access to justice in view of the constitutional provisions the following legislative and administrative reforms will have to be undertaken;

- i. Schedule Five of the Constitution provides for legislation to be put in place by parliament so as to give effect to Article 48 of the Constitution. The legislation contemplated in Schedule Five should be enacted and all laws dealing with access to justice brought into conformity with the constitution and that Act.
- ii. There is need for the enactment of legislation to make provision for the use of ADR and TDRM in the resolution of conflicts and the proper linking of these mechanisms with the courts. This Act will consolidate and harmonize all laws touching on ADR and TDRMs.
- iii. Amendment and review of all sectoral laws relating to access to justice should be done forthwith so as to remove ambiguities and other barriers to access to

¹⁰ See generally Kariuki Muigua , *“Alternative Dispute Resolution and Article 159 of the Constitution”*, Paper Presented during the Training of Magistrates and Judges in Lake Baringo Soi Lodge on 3rd -8th September 2012.

¹¹ FIDA Kenya, *“The Peoples Version Informal Justice System”* (2011)

¹² See generally, Kameri Mbote and Migai Akech, *“Justice Sector and the Rule of Law”* A review by AfriMAP and the Open Society Initiative for Eastern Africa (March 2011).

- justice. Review of the laws relating to access to justice will also consolidate and harmonize them in line with the constitution. This will be geared towards meeting the constitutional threshold in relation to access to justice.
- iv. Procedural technicalities and other procedural barriers including some evidential rules applied in court should be reviewed forthwith.
 - v. There is need for a comprehensive national policy on access to justice to consolidate and harmonize the activities of the various actors offering legal aid and awareness in the nation. This will implement the provisions of Article 59 (2) and (4) of the Constitution.
 - vi. In the long run government should provide the necessary funding for the construction of courts in major towns and at least a High Court station in every county. That is devolution of legal services to the devolved units as envisaged under Article 174 of the constitution. This will bring justice closer to the people and hence overcome geographical barriers to access to justice. The judiciary is doing pretty well in building more court stations and using mobile courts.
 - vii. NCAJ will need more funding from the government so as to effectively coordinate, monitor and evaluate strategies on the effective administration of justice.¹³
 - viii. The court infrastructure should be constructed in such a way that it considers the special needs of persons with disabilities. Regard should also be had to providing services needed by the deaf and blind persons in using court facilities.¹⁴
 - ix. The language of courts both the superior and magistrates courts should be both English and Swahili. This will ensure that even the illiterate can access the courts.
 - x. Judicial training will be essential in equipping judges, magistrates and other judicial officers with the pertinent knowledge and skills in discharging their responsibilities more efficiently. This would include skills and knowledge in emerging areas of law such as ICT, environmental law and ADR and traditional dispute resolution mechanisms.

¹³ See generally the Second Draft of The National Council for The Administration of Justice, Strategic Plan 2012-2016.

¹⁴ "Judicial Reforms and Access to Justice in Kenya: Realizing the Promise of the New Constitution", A Report of a Study Commissioned by the Kenya Civil Society Strengthening Program, 2011, pp.67-68

- xi. Civic education will be quintessential especially among the poor and vulnerable groups based in the rural areas, where there are very few legal clinics, advocacy groups and civic educators so as to strengthen and expand their presence.¹⁵
- xii. There will be a need to incorporate the provision of legal aid as part of the mandatory curriculum in law schools. This has remained a major shortcoming in legal aid provision. This would provide law students with invaluable practical experience, but above all it would drastically increase the amount of available volunteers providing legal aid. It would also contribute to raising community awareness and perhaps incentivize students to return to this line of work later on.¹⁶

5.0 Conclusion

There is need to put the necessary legal and administrative infrastructure so as to realize the right to access to justice for all Kenyans. If implemented, the constitutional threshold set by the constitution will see the country meet its obligations under international human rights treaties to which Kenya is a party. Improving access to justice will also help in reduction of poverty as access to justice has a link with poverty. It is hoped that if the above recommendations are adopted and implemented there will be the realization of the right to access to justice for every Kenyan.

¹⁵ "A Framework for Strengthening Access to Justice in Indonesia", available at, <http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/A2JFrameworkEnglish.pdf>, accessed on 12/10/12.

¹⁶ Mark Rix, "Legal Aid, the Community Legal Sector and Access to Justice: What has been the Record of the Australian Government?", (University of Wollongong -Research Online, 2007), p. 2